

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES DIXON, JR.,

Plaintiff,

Civil No. 02-74476
Hon. John Feikens

v.

JOHN D. ASHCROFT, IN HIS CAPACITY AS
ATTORNEY GENERAL OF THE UNITED
STATES OF AMERICA, AND, ROBERT S.
MUELLER, DIRECTOR OF THE FEDERAL
BUREAU OF INVESTIGATION.

Defendants.

OPINION AND ORDER

This matter is before the court on defendants' motion to dismiss this case for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). For the reasons which follow, defendants' motion is granted.

I. FACTS

The plaintiff, James Dixon Jr., is an African American male who was employed by the Federal Bureau of Investigation (FBI) in the Detroit Division from 1978 to 1988. During this time, he worked in various roles such as Applicant Coordinator and White Collar Crime Relief Supervisor. Plaintiff resigned from the FBI in 1988 to assist his spouse in starting a family-owned hair salon chain. In May 1991, when his spouse was able to manage the business, plaintiff applied for reinstatement with the Bureau.

Plaintiff was interviewed upon receipt of his application. Following the interview, FBI background investigators interviewed employment references identified by plaintiff as “friends or acquaintances employed by the FBI.” Plaintiff’s former supervisor, Assistant Special Agent in Charge (ASAC) Robert Ruetter, was also contacted concerning plaintiff’s suitability for reinstatement.

The summaries made by the FBI background investigators included several negative reports relating to an incident said to have occurred in the early 1980's. At that time, plaintiff was assigned to applicant recruitment, and sat on the Agent Interview Board panel with Supervisory Special Agent (SSA) Anthony and Special Agent (SA) Nelson. Plaintiff was the lead interviewer and was responsible for submitting the panel’s final opinion on a candidate. On one occasion, the panel voted to reject an applicant, but the final opinion submitted by plaintiff reflected a favorable recommendation. According to information provided by SSA Anthony in his interview with FBI background investigators, plaintiff admitted afterwards that he changed the applicant’s score without the panel’s approval. It does not appear that any formal report of this incident was made. However SSA Anthony, SA Nelson, and ASAC Ruetter all advised against reinstating plaintiff for lack of trustworthiness.

After reviewing plaintiff’s background investigation, Administrative Services Division (“ASD”) SSA Peter Gulotta made the initial determination not to reinstate plaintiff. (Def. Ex. R, 7). Gulotta did not speak directly to SA Nelson or SSA Anthony in reaching his decision, but did consider the reports made from their interviews. Id. SSA Gulotta’s recommendation to deny plaintiff’s request for reinstatement was approved by Section Chief Faustino Pino. Id. at 9. Plaintiff’s application was finally denied by the Assistant Director of ASD, Weldon Kennedy. Id.

Plaintiff contacted the FBI in 1994 and learned that his request for reinstatement had been denied due to negative interviews given by coworkers or supervisors. Plaintiff requested and reviewed his personnel file in June 1997. He contacted an Equal Employment Opportunity (EEO) counselor at the FBI's Detroit Division on July 8, 1997.

Plaintiff filed an administrative complaint of discrimination on the basis of his race on August 20, 1997. The Administrative Law Judge's (ALJ) August 21, 2001 Findings of Fact and Conclusions of Law in favor of plaintiff were rejected by the United States Department of Justice, Complaint Adjudication Office (CAO). (Def. Ex. N). The CAO noted an appeal to the EEOC's Office of Federal Operations on October 4, 2001. (Def. Ex. O). The EEOC's Office of Federal Operations upheld the CAO decision and found that the record did not support the ALJ's findings of discrimination. (Def. Ex. P).

Plaintiff brings four claims before this court. Count I alleges retaliation in violation of Title VII. In Count II, plaintiff claims his Fourteenth Amendment rights were violated when he was denied reinstatement without due process. Counts III and IV allege Defamation and Injurious Falsehood.

II. STANDARD OF REVIEW

Where subject matter jurisdiction is challenged pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir.1990). Specifically, the plaintiff must show that the complaint "alleges a claim under federal law, and that the claim is 'substantial.'" Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1248 (6th Cir.1996). The plaintiff's case will survive the motion to dismiss by showing "any

arguable basis in law” for the claims set forth in the complaint. Id.

III. ANALYSIS

Count I: Title VII Retaliation

Plaintiff alleges unlawful retaliation under Title VII. In order for a federal court to have subject matter jurisdiction over a Title VII claim, the claimant must first present his or her complaints to the EEOC. Ang v. Procter & Gamble Co., 932 F.2d 540, 545 (6th Cir. 1991) (finding that plaintiff’s retaliation claim was properly dismissed when plaintiff did not refer to retaliation in his EEOC charge). It is necessary for plaintiff to exhaust his administrative remedies unless the alleged retaliation stems from the filing of an EEOC claim. Minnis v. McDonnell Douglas Technical Services Co., 162 F.Supp.2d 718,738 (E.D. Mich. 2001).

In this case, the decision not to reinstate plaintiff was made prior to the EEOC charge. In order to bring a retaliation claim in this court, plaintiff would have had to include allegations of retaliation in his EEOC charge. Plaintiff checked the box for “race” as grounds for discrimination on his EEOC complaint but did not check “reprisal.” (Def. Ex. L). Thereafter, plaintiff received a letter from the FBI regarding processing of the EEO complaint. (Def. Ex. M.) The letter stated in relevant part:

The issue accepted for investigation is as follows:

Whether you were discriminated against based on race (Black) when you were denied reinstatement with the FBI on or about June 3, 1997.

The letter goes on to explain:

If you believe that the issue or basis in your complaint has not been properly identified, please notify me in writing, within 15 calendar days after your receipt of this letter, specifying the basis of your belief.

Plaintiff did not raise a retaliation claim on his EEOC complaint even when he was given a second opportunity to do so.

Plaintiff nonetheless argues that the retaliation issue was raised at the hearing before Administrative Law Judge Gonzolas on February 27, 2001, and in the First Amended Complaint which plaintiff attempted to file before the EEOC.¹ However, courts have considered and rejected this reasoning. *See Abieta v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 254 (6th Cir. 1998) (affirming summary judgment for the defendant due to a failure to exhaust remedies where the plaintiff had alleged retaliation in her civil suit but failed to check the retaliation box in her EEOC complaint); *Gray v. United States Postal Service*, 133 F. Supp.2d 593 (N.D. Ohio 2001) (finding that employee failed to exhaust remedies for sexual harassment claim since employee did not check box on EEOC complaint alleging discrimination based on sex, even though statements about sexual harassment were made at her administrative hearings).

Therefore, plaintiff's Title VII claim of retaliation is dismissed for lack of subject matter jurisdiction because plaintiff did not exhaust his administrative remedies on that issue.

Count II: 14th Amendment Violation

Count II of plaintiff's complaint alleges:

Defendant's actions in depriving Plaintiff of his constitutionally protected property interest in continued employment, absent a hearing or other notice of the grounds for his failure to be reinstated and an opportunity to respond abridged his right to due process of law in violation of the Fourteenth Amendment to the United States Constitution.

According to the complaint, defendants violated plaintiff's due process rights under 42 U.S.C. §

¹Plaintiff raises this argument in his Surreply Brief, filed February 24, 2003. However, the Administrative Law Judge denied plaintiff's Motion to Amend the EEOC Complaint. (Def. Supp. Br.)

1983 in 1994, when they informed him that he would not be reinstated.

Count II of plaintiff's complaint must be dismissed for lack of subject matter jurisdiction. Defendants are not subject to suit under 42 U.S.C. § 1983. Section 1983 provides a remedy for persons who are deprived of federally protected constitutional rights, privileges, and immunities by the actions of persons who are acting under color of state law. However, since the actions at issue in this case were taken under color of federal law, § 1983 is inapplicable.

Plaintiff claims that the complaint should be construed as a cause of action under Bivens, which requires a plaintiff to allege that a defendant acted under color of federal law to deprive plaintiff of a constitutional right. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). However, plaintiff has not established that he had a protected property interest in reinstatement to the FBI. In order to make out such a claim, plaintiff must either show that such a property interest exists, or that a stigma is attached to his removal. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In fact, "absent a promise of continued employment or some other basis for expectancy of job retention, a government employee may even be fired without due process protections." Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Broadway v. Block, 694 F.2d 979 (5th Cir. 1982).

Furthermore, to the extent that plaintiff's constitutional claim alleges employment discrimination, the exclusive remedy for claims of federal sector employment discrimination is Title VII. Brown v. GSA, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). *See also* Perez v. FBI, 71 F.3d 513, 515 (5th Cir. 1995) (dismissing Bivens claim because Title VII provides both the exclusive cause of action and the exclusive remedy for federal employees asserting claims of employment discrimination).

Counts III & IV - Defamation and Injurious Falsehood

Both parties have stipulated that plaintiff's defamation and injurious falsehood claims are barred by the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2671, et seq. The FTCA permits suits against the federal government when its employees commit certain torts. When filing suit under the FTCA, the United States is the only proper defendant. 28 U.S.C. § 2674.

A federal court lacks subject matter jurisdiction over an FTCA complaint unless a plaintiff exhausts his administrative remedies prior to bringing suit. Garrett v. United States, 640 F.2d 24, 26 (6th Cir. 1981). In this case, plaintiff never filed an administrative claim against the FBI as required by the Act. 28 U.S.C. § 2675(a); McNeil v. United States, 508 U.S. 106, 113, 113 S.Ct 1980, 124 L.Ed 2d 21 (1993). The filing of an administrative claim is a jurisdictional prerequisite to filing an action under the FTCA. Id. Thus, plaintiff's defamation and injurious falsehood claims are also dismissed for lack of subject matter jurisdiction.

IV. CONCLUSION

In conclusion, Counts I-IV of plaintiff's complaint are dismissed for lack of subject matter jurisdiction. Accordingly, defendants' motion to dismiss is hereby GRANTED.

IT IS SO ORDERED.

John Feikens
United States District Judge

Date: _____

